Integration of European Legal Orders
Challenges and Expectations

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I wish to express my gratitude for the privilege of offering a statement in law when the sound of music, in the introductory film, and the dimension of poetry and philosophy are still vibrant in our ears. It is unfortunately not so frequent although it should always be the case that the arts and the laws are put together. Particularly when we are talking about the essence of the laws, the incarnation of the genius of nations in the social sphere.

Du Bellay, a poet of the French nation, widely acclaimed for its incommensurate modesty, wrote in *Les Regrets*, a very pessimistic piece published in 1558, that France was "mère des arts, des armes et des lois" (mother of arts, of arms and of laws). Which confirms the ancient character of the link between art and laws. Yet it adds in between, with the reference to "arms", a military element that would justify the presence of some uniforms in the hall of our deliberations. Therefore I will leave the analogy at that, by deference to the politician[1] who aptly noted that military justice was to justice what military music was to music -whatever he meant by that. Yet I am prepared to believe that, if there is no music without the laws of music, there is no law without the music of law -again, whatever it means, as long as beauty prevails…

To come down to earth however, it must be said that the poetic element in the approximation of laws that the Union of the European Member States entail is not always immediately perceptible. It is fair to note that there is difficulty in finding much elegance in the determination that *"the budgetary position of the general government of a Contracting Party shall be deemed to be balanced or in surplus if the annual structural balance of the general government is at its country-specific medium-term objective, as defined in the Stability and Growth Pact, with a lower limit of a structural deficit of 0,5% of the gross domestic product at market prices*", as is said at Article 3 of the Fiscal Compact Treaty of 2012. This is probably an economist's idea of the beauty of law. Not something that matters a lot beyond its operative function.

[1] Georges Clémenceau, twice President of the Council (Head of Government) in France in 1906 and in 1917.

The fact is, we come from different legal surroundings in our old and not-so-old Member States and it is hard to maintain that a well-chosen word can have only one sense and should be retained, in good legislative drafting, by preference to a tortuous description of effects and exceptions. This is the classical purity of the Civil Code, whose accuracy Flaubert offered to fellow novelists as a model of style. *Les hommes naissent et demeurent libres et égaux en droits*.

"Sensible ideas can be expressed clearly
And the words to tell them come to mind easily."

But our ears are bound to be exposed to the inelegance of pen of negotiating business lawyers, who, when drafting contracts, think of the interests of their clients and disregard the global stylistic picture, better left to scholars and constitutionalists. One must admit that law reduced to an instrument of the world of economic affairs, to an operational kit of legistics, is not only the result of our diversity of spontaneous references, that makes a cleaner approach difficult, it is also the consequence of the practical influence of common law methods in the context of globalisation. These methods do not recognise a lot of merits to unqualified statements of a general character and display limited confidence in the hierarchy of norms. The school of pragmatism is a school of caution, particularly applied to concepts -that are so dangerously open to unforeseen developments in the course of judicial deliberations. And it is fair to recognise that the creativity expected of judicial thinking and the role of judges in making the law are greater in common law England, for example, than they are in the continental tradition dating from the nineteenth century for which the judge is but the mouthpiece of the law. A freer judge calls for a more prudent legislator. Rigorous regulations for literary judgments. But our European Union judiciary maintains a style that is mainly regulatory, in a compromise between the very short, blunt, affirmative style of the Conseil d'Etat and the more lengthy exposition of the merits of each of the legal arguments raised in the claims, German style. But, short or long, the ECJ speaks as a collective body, without dissenting opinions, and individual views are left to advocates general - whose opinions do not form part of the jurisprudence. Thus, as a whole, the Court contributes to the simplicity of law and the hierarchy of norms.

And the European project, the basis of our collective law-making, finds its origins in a vision that was not mercantile, but idealistic. The purpose of the Monet/Schuman plan of 1951, as any first year student of European law learns, was to create the conditions of a political Union through the creation of a Common Market that would teach participants to work together on the basis of identical norms and procedures. From cooperation to harmonisation in the field of economics, from there to the rest of social life with an

explicit prospect of natural evolution into political federalism at the end of the integration course. If that were to improve economic competitiveness and facilitate growth along the way, very fine but the predominant purpose was elsewhere. It was not to foster economic liberalism -a word which was still largely anathema in most European States in the fifties -east or west- that were embarked in heavy State spending in reconstruction plans. It was to unite the minds of the peoples around a project based on peace, reason and humanism. European economics were a tool to start walking away from a political culture of nationalism and confrontation, not an end in themselves but a device to make people carry on with their tasks only to discover, one day, that they are all together in the same boat and rowing in the same direction, in a community of law, a community based on the Rule of Law, of which the political unification would be a mere formality.

The plan was hugely successful although it did not work out as foreseen. Economists proved so hopeless in their area of supposed competence that they were put in charge of governing society at large instead of the coal and steel industry alone. Political society took its revenge by turning away from the ideal of Christian solidarity of the Alsatian-Luxemburgish fathers and seeking consolation in a generalised contempt of political elites and particularly those of the Carrefour Schuman in Brussels. Yet the Union machinery worked like mad, took control of close to 80% of the set of norms governing the life of its Member States, whose number increased over four times in actually very few years to cover almost the whole of geographic and historic Europe. People did find themselves rowing together in this enlarged and consolidated boat, profoundly and intimately interdependent, yet not on the verge of being politically unified. *United in our diversity*? Well, actually, not that diverse, with a little help from globalisation and co-decision, but not that united either.

Who knows what to make of the current uncertain times? Euro-scepticism is a radical expression of the reluctance to achieve the transfers of competence that would make the State level of government essentially superfluous. It is also a sign of the realisation that the issue is actually behind us, that national government structures have already lost in many Member States much of their relevance and of their authority. The move to a European Council based institutional framework of the Union has reduced the effective decision-making centre of many Member States to a relatively isolated Head of State or of Government, with a very weakened upper and middle superstructure and, conversely, an increased autonomy of the lower echelons. There is no adequate replacement at Union level for this loss of knowledge and wisdom that is perceptible. The Brussels bureaucracy is actually in small numbers, with real competence principally in the Commission. I count out of course the hordes of lobbyists, agents of interest groups, think tanks, consultants, activists and true believers posturing as

stakeholders and as representatives of civil society, who offer to institutions a distorted and misleading view of the reality of the Member States, including their legal orders and the state of their public opinions, and whose ability to provide any relevant and impartial contribution ought to be questioned, were it only for the sake of democracy, fairness and good administration.

There is manifestly little appetite in the present context for increasing the size or expanding the authority of the Brussels institutions. Yet the permanent state of transition we live in has the effect that something has disappeared in the picture that has to do with the culture of constitutional and administrative history. Those who knew at home are vanishing from the operational landscape and it cannot be expected that any replacement will be found in Union bureaucracies that have developed away from any native soil - leaving aside that of Bruges, admittedly a very nice one…-and have always believed that national systems and manners were a barrier to harmonisation.

We stand in a partial vacuum between two stages with a head that is too small on a body that is strong in places but poorly coordinated. Of course things will evolve and such incoherencies are natural to any process of growth that is not linear. The enlargement of 2004 certainly was instrumental in keeping the Union together in difficult times. It faced criticisms from some, in the founding Member states, who thought that a territorial expansion of the Union put it at risk of being reduced to a free trade area, along the lines the UK supported, with a much weakened focus on the construction of a common integrated legal culture. It was not so. It is obvious that, from the foreign policy angle, the expansion has offset the balance between the "old" and the "new" Europe that the Bush administration distinguished at the time of the second Iraq war. But, from the angle of the internal policies of the Union, many "new" Member States (and, needless to say, specially Estonia and its Baltic neighbours) have demonstrated a sustained interest and a readiness to move along harmonized lines that is unequalled in the States whose unification process had already 50 years of age… This renewed interest, without amounting to an enthusiasm that would hardly fit with the spirit of the times, has allowed the process to continue through a largely negative mood perceptible in the west of the continent.

But it is no longer enough and an additional element of will must be introduced now with legal thinking as its backbone.

The law of the Union has already played this part of keeping together a Union that was not holding water very well in political terms during the crisis of the seventies. The Court of Justice held the bar firmly then. In the present times, the network established between the Court and national judges

including the Supreme Courts of the Member States, and the dialogue of the judges that it produces, are a decisive factor of the cohesive capacity of EU mechanisms.

There is a certain mystique of legislative deliberation in the Court's inner vision of its constitutional function, that draws on an analogy with the Gods on the Olympus or the Sabbath of the witches depending on which mythology one draws. It has also to do with making the tables talk. Each Member of the Court is the bearer of a portion of the collective soul of the peoples that brought him or her in the Chamber and, by touching fingers of his fellow searchers, is able to let a collective voice raise from the depth of the ages to pour its glory onto present times.

Admittedly, this glory uses passageways that are not obviously noble for the uneducated eye, such as determining the social rights of migrant prostitutes, ruling on dumping cases, deciding the scope of procurement law, defining positions in the Customs Tariff or assessing the distinctive character of a trade mark. After all, the stuff that days are made of. The subject matter is, once again, unsubstantial. The aim of it all is to put together minds that are differently formed and are able to provide an educated emanation of their respective place of intellectual origin, so that they may come out with a judgment that is not only a commonly agreed interpretation of the collective law of the Union but the result of an assessment of the various tools and methods available to approach a case and of a choice of the most effective or of the least controversial option or mix of options.

What takes place inside the Court is only a small scale replica of the resonance that is perceptible between the Higher national Courts and the European Courts. It is commonly said that the ordinary judges of Union law are the national judges. I would say, not only ordinary. The rulings of the *Bundesverfassungsgericht* on the Banking Union have acquired an authority and an influence sufficient to compare with, if not to equal, that of the ECJ, in spite of not being binding on any one outside Germany. That may be an extreme example, but certainly not an isolated one. To name but another, the Constitutional Review Chamber of the Estonian Supreme Court is one whose judgments are also in demand on the Kirchberg.

It is the duty of national jurisdictions to form a body of legal thinking that is not only coherent, to ensure equivalence and effectivity in the delivery of rights emanating from Union law, but that is common to all, to such an extent that a case to be decided under the law of a given Member State could be dealt with by the Courts of another without a negative effect for the performance of justice. This result can be facilitated by the many common rules that are adopted, or about to be adopted, in the area of freedom,

security and justice. My colleague Hans NILSSON will take up that point later on. But it should mainly be the result of the proximity that comes from being familiar with how other partners think, from being interested in it and open to it, at ease yet constructively critical. The law of other Member States is not fact, it is law. I am not a witness of it, I am a party to it.

But legal integration is not solely a matter for judges. It is also a subject where academic input is essential; I must leave that to others than myself. It is also highly relevant to legislative work, and there I have a word to say.

The simplistic approach to legislation is that there is one and only one path, in the broad domain of matters of shared competence, from unexercised competence to exclusive competence of the Union, from minimal to maximal harmonisation and, for the choice of the relevant instrument, from directives, which leave the choice of form and methods to national authorities, to regulations, directly applicable and binding in their entirety. This "ever closer" approach, so unpopular in London, justifies the Commission's systematic preference for regulations in its proposals concerning the internal market. When this amounts to proposing regulations when most of the intended legal effects are to require certain acts from the Member States and to delegate powers of action to the Commission, it sounds to me like an abuse of the instrument for ideological purposes.

A dogmatic approach to the legal form of proposals, and the relative facility of having legislation adopted in the present institutional context of the Union, may lead to implementing difficulties at home down the road. And these difficulties may involve the national courts and occasion possible conflicts and situations of institutional crises.

Therefore, if one takes a rational view of integration in the complex phase we are going through, special attention to the constitutional requirements of the Member States is required. The supremacy of EU law in force over national law should be respected but EU law in the making should identify potential sources of crisis and avoid them rather than force the way through qualified majority voting with ears and eyes shut. Once again, the case law of the national courts is also law of the Union and to disregard it completely for the sake of an absurdly aggressive concept of the community method will not do. Fortunately the inclusive approach has mainly prevailed recently for the good of all and without compromising at all the prospect of integration, quite to the contrary. The inclusion of an intergovernmental agreement between the Member States in the construction of the Single Resolution Mechanism for banks, that has been criticized by part of the doctrine as inter-governmentalist

regression, is the opposite since it brings interdependence several steps further without antagonising national constitutional bodies and courts.

The same applies *a fortiori* to matters which, until quite recently, were regarded by the ECJ as falling within the procedural autonomy of Member States, such as remedies and procedures, the organisation of justice, which there are now bases to harmonise -but at a pace that must be considerate. I have always expressed in this respect my doubts about the wisdom of Vice President's Reding's agenda according to which there should be a single minister of justice for Europe as a whole in ten years time.

The weakening of the justice systems and of the middle structures of state government in some Member States would not be an asset for the Union since it would augment the risk of inconsistencies between Union law and the existing framework of national regulation.

This is why, in my view, national authorities, parliamentary and governmental, should, like judicial bodies, retain their functional independence and their autonomous culture, yet speak more and more a language that is understandable to each other - thus avoiding a top-down line of integration that is not supported by a sustained and intensive horizontal dialogue between national administrations and structures. This is of course not anything directed against the European Commission - whose place in such a dialogue no one denies.

My conclusive assessment of this situation is that the EU mechanisms work technically very well, that things are moving towards heavy transfers of additional powers to be exercised at Union level, but in a political context where popular confidence in national government structures and in EU integration is weak or very weak.

Fundamentally, the question thus put is that of an integration into what? An integration that dissolves national identities into a uniform melting-pot is neither the original purpose of a Union based on subsidiarity and the principle of conferral, nor a realistic political possibility in the current times. Yet none of the forms of Union between States or nations that have taken place in Europe since the end of the nineteenth century has been successful. We have two main methods to see to it that the same does not happen to the European Union. One is wrong. It is to let the degradation of the capacity of autonomous government of national administrations continue in the hope that it will increase the need for stronger political structures in Brussels. Such an evolution would indeed make a return to a state of no-Union more and more dangerous - but it would not make it less likely, with the piling up of frustration,

unfairness and inefficiencies it would bring about. The right method is to stabilize the current level of institutional balance, to give time to national structures to absorb recent developments and recover their strength and control, to limit adjustments to the repair of our obvious deficiencies without making a permanent imbalance our basic fundamental rule and disorder our principle. It is based on knowledge, respect and modesty - that usually go together, as do ignorance, arrogance and brutality.

A European Union founded on the destruction of the national level of government, deliberate or accidental, where there is no possibility for equivalent authority to be exercised at Union level, I consider to be the opposite of the integrative approach. The purpose of this approach is to bring the exercise of national regulatory powers together step by step, not to weaken government authority altogether. This might be well received, in the short term, by part of the industry. But it would make democracy ineffective and leave the Rule of Law unprotected. The avoidance of haste is therefore my advice, and the consolidation of the links that tie society in our large but potentially very coherent family of nations.

I have no doubt that Estonia will continue to be an exemplary partner in these times of patient work requiring more subtle and less aggressive forms of intelligence and imagination.

None of the States having joined the Union in 2004 has enjoyed the relatively slow pace of adjustment which their predecessors have benefitted from, with well over 30 years for the original Members to fully recognize the primacy of EU law and the authority of the ECJ. While embarking in an integration process at full speed, Estonia has joined Schengen in 2007 and the euro area in 2011. It has, according to the Commission's annual report on the application of EU Law, one of the three best results for infringement actions and, according to the Court's annual report, a record for preliminary rulings that is quite honourable, with 15 references between 2007 and 2013, including 5 from *Riigikohus*. The quantitative approach is certainly not decisive here (and I will leave aside State Aid issues that are still pending…), but all this indicates a serious commitment to participate in a way conducing to stability and confidence in Estonia as a Member State and in the Union. For this too, and for your very appreciated hospitality, I extend heartfelt congratulations before thanking you for your patient attention.